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Atty. Docket No. PLA13 P-300

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October 17, 2005  
Date

Melanie S. Jernberg  
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Art Unit : 2834  
Examiner : Joseph Waks  
Applicant : Steve Anderson Platt  
Appln. No. : 09/981,231  
Filing Date : October 17, 2001  
Conf. No. : 5580  
For : WIND POWERED GENERATOR

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Dear Sir:

APPLICANT'S REPLY UNDER 37 C.F.R. § 1.193

This is in reply to Examiner's Answer dated as mailed August 17, 2005.

Items (1-2):

The Examiner has agreed that these items are acceptable as listed in the Appeal Brief.

Item (3)

The Examiner's Answer includes a confusing status of the claims as claim 71 was indicated as being involved in the present appeal and as being allowed. However, Applicant believes that a correct status of the claims is as follows:

Claims 1-8, 11-14, 20-23, 29-37, 40, 46-49, 58-70 and 73 have been allowed.

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Claims 9, 10, 15-19, 24-28, 39, 41-45, 50-57, 71, 72 and 74 are the subject of this appeal.

Claim 38 has been cancelled.

Item (4)

Although the Examiner's Answer states that "[t]he amendment after final rejection filed on April 4, 2005 has not been entered," the Applicant received an advisory action dated April 25, 2005, indicating that the amendment filed April 4, 2005 was entered. The amendment filed April 4, 2005 only rewrote claim 40 into independent form. Since the Examiner's Answer has indicated that claim 40 has been allowed, Applicant can only assume that the statement in the Examiner's Answer stating that the amendment filed April 4, 2005 was not entered was in error and should have said that the amendment was entered.

Items (5-6):

The Examiner has agreed that these items are acceptable as listed in the Appeal Brief.

Item (7):

The Examiner agreed that a correct copy of the appealed claims appears in the Appendix of the Appeal Brief.

Item (8):

The Examiner agrees with Applicant.

Items (9 and 10) Reply to Examiner's Grounds of Rejection and Arguments:

The Applicant's Appeal Brief stands, and is incorporated herein in its entirety. The following comments are intended to directly reply to the Examiner's Answer. In the

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Examiner's Answer, the Examiner made nine responses to the arguments made in Applicant's Appeal Brief. These nine arguments will be addressed in the order presented in the Examiner's Answer.

**A. Rejection of Claims 9, 10, 15, 17-19, 24, 26 and 71 as Being Unpatentable Over the Abe '434 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 9, 10, 15, 17-19, 24, 26, 57 and 71 are incorporated herein in their entirety.

Claims 9 and 17

According to the Examiner's Answer in the rejection of claim 9, Applicant's arguments for allowance of claim 9 in the Appeal Brief are inapplicable because "it is noted that the features upon which applicant relies . . . are not recited in the rejected claim(s)." However, it appears that the Examiner has misconstrued Applicant's arguments. Applicant was pointing out that the Examiner was interpreting the Abe '434 patent as having a wind powered generator that was in two spaced apart and unrelated elements of the Abe '434 patent, with one of the parts of the wind powered generator being locked within the carriage. According to the Examiner in the rejection of claim 18, the Abe '434 patent teaches that the operation of "removing the generator from the carriage all together" can be accomplished by "removing the shaft 8." Page 14 of the Examiner's Answer. The Examiner's Answer also states that the Abe '434 patent discloses "a carriage 6, 12." Page 4 of the Examiner's Answer. Furthermore, the Examiner's Answer states that the carriage also includes element 9 of the Abe '434 patent. Page 14 of the Examiner's Answer. Therefore, according to the Examiner's Answer, the Abe '434 patent includes (1) a wind powered generator including elements 2, 4 and 5 and (2) a carriage including elements 6, 9 and 12. However, taking the Examiner's Answer's interpretation of the Abe '434 patent, the thrust ring 17 can not accept any wind powered

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generator therein as claimed in claim 9. As shown in Fig. 2 of the Abe '434 patent, the element that the Examiner has identified as the pivot ring, element 17, is located between element 6 and element 12, the two elements that make up the carriage according to the Examiner's Answer. In fact, element 17 is fixedly located between element 6 and element 9. The only other element located between element 6 and element 9 is the shaft 10. Therefore, for the Examiner's rejection of claim 9 to be proper, the shaft 10 must be part of the wind powered generator and not the carriage. However, if the generator is removed all together from the carriage as set forth by the Examiner, the shaft 10 would still be connected to the elements defined by the Examiner as being the carriage and would be separate from the elements defined by the Examiner as being the generator. Since, in this situation, the generator is separated from the carriage all together, the shaft cannot be part of the generator. Therefore, the Abe '434 patent does not disclose a "carriage including a pivot ring configured to accept the wind powered generator therein" as claimed in claim 9. The thrust bearing 17 is not configured to accept anything therein because it is locked between the supporting member 6 and the base 9 and it does not in fact accept the wind powered generator therein. Accordingly, claim 9 is in condition for allowance.

Furthermore, according to the Examiner's Answer, the Abe '434 patent discloses only "one bearing" and that "[o]ne of ordinary skills in the art would easily recognize that Figure 2 shows the cross section of one single bearing 17 as indicated by the hatched lines" (emphasis in original). Applicant respectfully traverses the Examiner's interpretation of the Abe '434 patent. Applicant submits that the Abe '434 patent uses the term "a" when referring to the "thrust bearing 17" because the reference number 17 is only used once in the drawings of the Abe '434 patent. Therefore, Applicant continues to submit that Fig. 2 of the Abe '434 patent only discloses two spaced apart bearings 17 that are not a pivot ring as claimed in claim 9. Nevertheless, Applicant notes once again that "[t]he fact that a certain result or characteristic may occur or be present in the prior art is not sufficient to establish the inherency of that result

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or characteristic." M.P.E.P. § 2112; *In re Rijchaert*, 28 USPQ2d 1955, 1957 (Fed. Cir. 1993). "In relying upon the theory of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. and Inter. 1990) (emphasis original). Therefore, as illustrated by the above discussion, since the Abe '434 patent does not disclose a pivot ring and a pivot ring does not necessarily flow from the teachings of the Abe '434 patent, the Abe '434 patent does not disclose a pivot ring as claimed in claim 9. Accordingly, claim 9 is in condition for allowance.

Claim 17 depends from claim 9, and since claim 9 defines unobvious patentable subject matter, claim 17 defines patentable subject matter. Accordingly, claim 17 is also in condition for allowance.

#### Claims 10 and 19

Claims 10 and 19 state that the carriage includes a first side groove configured to accept a first vertical strip and a second side groove configured to accept a second vertical strip, thereby allowing the carriage to slide along the first vertical strip of a second vertical strip. In the Examiner's Answer, the Examiner takes the position that the dictionary used by the Examiner defines "groove" as "a channel" and that "channel" is defined as a "tubular passage." Page 13 of the Examiner's Answer. However, claims must be read in view of the specification and interpreted as one skilled in the art would interpret the claims. *See Phillips v. AWH Corp.*, 75 U.S.P.Q.2d 1321 (Fed. Cir. 2005). In view of the specification and as interpreted by one skilled in the art, the term groove as used in the claim is not a tubular passage. Furthermore, the Abe '434 patent does not disclose any groove as claimed in claims 10 or 19. Accordingly, claims 10 and 19 are in condition for allowance.

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#### Claim 15

Claim 15 states that the pivot ring includes a plurality of roller bearings configured to accept a portion of the wind powered generator thereon, thereby allowing the wind powered generator to rotate. As indicated above in regard to claim 9, the Examiner's Answer states that the Abe '434 patent only includes "one bearing" (emphasis in original). Therefore, if the Examiner's Answer is correct, the Abe '434 patent does not disclose a plurality of roller bearings as claimed in claim 15. Applicant submits that the Examiner's Answer improperly is taking the inconsistent position that the Abe '434 patent discloses only one bearing to reject claim 9, but discloses a plurality of bearings to reject claim 15, which depends from claim 9. Nevertheless, Applicant submits that claim 9 is in condition for allowance as outlined above such that claim 15, which depends from claim 9, is also in condition for allowance.

#### Claim 24

Claim 24 depends from claim 18 and includes a wind powered generator and a carriage, with the carriage including a pivot ring configured to accept the wind powered generator therein. As discussed above in regard to claim 9, the Abe '434 patent does not disclose a carriage including a pivot ring configured to accept a wind powered generator therein.

#### **B. Rejection of Claims 18 and 19 as Being Anticipated by the Willis et al. '198 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 18 and 19 are incorporated herein in their entirety. Furthermore, in the Examiner's Answer, the Examiner states that Figure 7 of the Willis et al. '198 patent "clearly shows the generator 16 being removed from carriage 32 after being lowered to the bottom of the tower 12." Page 15 of the Examiner's Answer. However, Figure 7 of the Willis et al. '198 does not

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necessarily show that the turbine 16 is removably placed within the carriage 32. Accordingly, claims 18 and 19 are in condition for allowance.

**C. Rejection of Claims 16 and 25 as Being Unpatentable Over the Abe '434 Patent in View of the Douthit '507 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 18 and 19 are incorporated herein in their entirety. Furthermore, the Examiner's Answer appears to state that the combination of the Abe '434 patent and the Douthit '507 patent requires further modification that is a "design choice" and that "one of ordinary skill in the art would be able to design the wiring connecting the stationary ring with the outside supply after installing the nacelle on the top f (sic) [of] the tower or to disconnect the wiring from nacelle before lowering it down." Page 16 of the Examiner's Answer. Applicant submits that implicit in these statements is an admission that a combination of the Abe '434 patent and the Douthit '507 patent would not work and that a further modification would be required to make the system work. Accordingly, Applicant submits that there is no suggestion or motivation for combining these references as set forth in the Examiner's Answer because such a combination would not work and therefore these references teach away from any such modification. Therefore, Applicant submits that claims 16 and 25 are in condition for allowance.

**D. Rejection of Claims 27 and 28 as Being Unpatentable Over the Abe '434 Patent in View of the Barnes '631 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 27 and 28 are incorporated herein in their entirety.

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**E. Rejection of Claims 39, 41-45, 50, 52 and 54-56 as Being Unpatentable Over the Salter '631 Patent in View of the Abe '434 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 39, 41-45, 50, 52 and 54-56 are incorporated herein in their entirety.

Claim 39

First, Applicant would like to address the Examiner's Answer reference to 37 C.F.R. §1.111(b). Claim 39 states that the generator is located upwind of the spars. The Examiner's Answer admits that the Salter '631 patent does not include this feature and has combined the Salter '631 patent with Abe '434 patent to reject claim 39. Applicant's argument for the allowability of claim 39 in the Appeal Brief addresses this combination and submits that it is inappropriate. Furthermore, the mandate of 37 C.F.R. §1.111(b) only applies once the Examiner has made a *prima facie* rejection of the claims, which Applicant submits has not been made in the rejection of claim 39.

Second, Applicant submits that the burden is not on the Applicant to prove patentability absent a *prima facie* rejection of the claims. According to the Examiner's Answer:

Applicant's argument regarding the placing a generator upwind the rotor causing reduction of performance of the impeller blades is not supported by the specification and there is no evidence in the specification about any particular benefit or improvement derived from the upwind or downwind location and it seems that this particular feature is a design choice.

Pages 17-18 of the Examiner's Answer. Applicant is unsure if the Examiner's Answer is referring to Applicant's specification or the specifications of the cited references in this passage. If the Examiner's Answer is referring to Applicant's specification, Applicant once again submits that the Examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. The initial burden is not on the Applicant to factually support a *prima facie* conclusion of non-obviousness. If the



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Examiner's Answer is referring to the specifications in the cited patents, Applicant agrees that the cited patents do not provide any suggestion or motivation for placing a generator upwind of spars.

Third, Applicant submits that placing the generator of the Salter '631 patent upwind of the airfoils 19 would reduce the efficiency of the Salter '631 system. The airfoils of the Salter '631 system are fixed in position. The Examiner's Answer states that the Salter '631 system would work equally well if the air flowed against the back of the airfoils or against the front of the airfoils. However, this is just not the case. The airfoils of the Salter '631 patent are positioned to provide lift and thereby rotate the rotors 12. If the wind flowed against the rear of the airfoils, the airfoils would not provide any lift and would therefore not rotate the rotors. The argument set forth in the Examiner's Answer is identical to saying the positioning wings on an airplane upside down would still provide lift to the airplane. However, this is just not the case.

Fourth, the Examiner's Answer cites *In re Japikse* for the proposition that "[i]t has been held that rearranging parts of an invention involves only routine skill in the art. While from an unpublished opinion of the Board of Patent Appeals and Interferences, Applicant submits that the following quotation from *Ex Parte Robles et al.*, 1997 WL 1883840 (B.P.A.I. 1997) (NO. APPEAL 1997-0350) sums up any *per se* rejection using *In re Japikse*:

The examiner cites *In re Japikse*, 181 F.2d 1019, 86 USPQ 70 (CCPA 1950) for the general proposition that "a mere shifting the location of parts" of an apparatus is a matter of obviousness for the skilled artisan (page 4 of Answer). However, our review of the case reveals no such proposition or rule of law . . . We think it is quite clear that *Japikse* is limited to the facts of the case.

Nevertheless, the Examiner has not compared the facts in *In re Japikse* and explained why, based upon this comparison, the legal conclusion in the present case should be the same as that in *In re Japikse* as required by M.P.E.P. §2144. Instead, the Examiner has relied on a *per se* rule that rearranging parts of an invention involves only routine skill in the art. However, it is

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clear that “reliance on *per se* rules of obviousness is legally incorrect and must cease.” *In re Ochiai*, 37 U.S.P.Q.2d 1127, 1133 (Fed. Cir. 1995).

Fifth, as to the Examiner’s Answer’s motivation for combining the Salter ‘631 patent with the Abe ‘434 patent in order to improve the generator cooling, Applicant submits that the Salter ‘631 patent teaches against any such modification as discussed above, that such a motivation that such cooling is needed or desired cannot be found in the references or in one of ordinary skill in the art, or that placing the generator upwind would improve cooling of the generator.

Finally, according to the Examiner’s Answer, the Salter ‘631 patent discloses a rod 24 configured to rotate within a housing 33, 36, with the housing 33, 36 being connected to an electrical generator 16. However, the bearing assembly 24 of the Salter ‘631 patent does not rotate within either the lever arm 33 or the support arm 36. As illustrated in FIG. 3 of the Salter ‘631 patent, the bearing assembly 24 includes a first part fixed to the lever arm 33 and a second part that surrounds the first part and that rotates thereon. Therefore, the Salter ‘631 patent does not disclose anything that rotates within the lever arm 33 or the support arm 36 and any combination of the Salter ‘631 patent with the Abe ‘434 patent would not include this feature.

Therefore, Applicant submits that claim 39 is in condition for allowance.

#### Claim 41

As stated above in regard to claim 39, the Salter ‘631 patent and the Abe ‘434 patent do not disclose a rod configured to rotate within a housing. Accordingly, claim 41 is in condition for allowance.

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#### Claim 42

According to the Examiner's Answer, the Salter '631 patent includes a housing 33, 36, with the housing 33, 36 being connected to the generator 16 by a vertical leg 16. However, the Salter '631 patent does not disclose a housing connected to an end of a vertical leg at a position off center from an axis of the vertical leg. Notably, the Examiner's Answer has not addressed this element of claim 42. Accordingly, claim 42 is in condition for allowance.

#### Claim 44

Applicant notes that the Examiner's Answer has modified the Salter '631 patent to have a generator housing located upwind of a rotor as taught by the Abe '434 patent. Accordingly, the combination as set forth in the Examiner's Answer does not include any tower including an elevator or a carriage as such is not disclosed in the Salter '631 patent nor added to the teaching of the Salter '631 patent as set forth in the Examiner's Answer. Furthermore, Applicant submits that there is no suggestion or motivation for such a combination as discussed above in regard to claim 39. Accordingly, claim 44 is in condition for allowance.

#### Claim 45

The Examiner's Answer appears, for the first time notably, to reject claim 45 by further modifying the combination of the Salter '631 patent with the Abe '434 patent by adding a guide and carriage of the Abe '434 patent to the previous combination of the Salter '631 patent and the Abe '434 patent. According to the Examiner's Answer, such a modification is "for the purpose of elevating the turbine on the top of the tower." Page 19 of the Examiner's Answer. However, the "turbine" of the Salter '631 patent as modified by the Abe '434 is already at the top of the support column 55. Therefore, the motivation as set forth in the Examiner's Answer is already accomplished by the

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prior combination of the references. Furthermore, the Examiner's Answer has not identified a first member rotatably connected to a carriage, with the first member having an axis of rotation substantially parallel to the direction of movement of the carriage, a second member connected to the first member, with the second member having a first end and a second end, a hub assembly connected to the first end of the second member, with the hub assembly including a plurality of spars, an airfoil is connected to each spar, and a generator connected to the second end of the second member. In fact, no element of claims 44 or 45 is addressed in the Examiner's Answer. Moreover, Applicant submits that such a rejection has not been made because such a rejection cannot be made as any combination of the Salter '631 patent and the Abe '434 patent would not include such elements. Furthermore, any such combination would not include any groove as discussed above in regard to claim 10. Accordingly, claim 45 is in condition for allowance.

#### Claim 50

As discussed above in regard to claim 15, the Abe '434 patent does not disclose or suggest a plurality of roller bearings as claimed in claim 50. Furthermore, any combination of the Salter '631 patent and the Abe '434 patent would not include a carriage including a pivot ring having a plurality of roller bearings configured to accept the first member thereon. Accordingly, claim 50 is in condition for allowance.

#### Claim 54

According to the Examiner's Answer, the Salter '631 patent includes a housing 33, 36, with the housing 33, 36 being connected to the generator 16 by a vertical leg 16. However, the Salter '631 patent does not disclose a housing connected to an end of a vertical leg at a position off center from an axis of the vertical leg. Notably, the

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Examiner's Answer has not addressed this element of claim 54 or any of the elements of the base claim. Accordingly, claim 54 is in condition for allowance.

#### Claim 55

Applicant notes that the Examiner's Answer has not identified any second member in either the Salter '613 patent or the Abe '434 patent. Furthermore, Applicant submits that neither of these two patents includes any second member and spars extending from a hub in a position substantially perpendicular to the second member. Accordingly, claim 55 is in condition for allowance.

#### Claim 56

Applicant notes that the Examiner's Answer has not identified any airfoils configured to pivot about spars in either the Salter '613 patent or the Abe '434 patent. Furthermore, the Examiner has admitted that neither of these patents includes the elements of claim 56 as outlined in the Appeal Brief. The Examiner's Answer makes the same admission in the rejection of claim 53 on page 9 of the Examiner's Answer. Accordingly, claim 56 is in condition for allowance.

#### **F. Rejection of Claim 51 as Being Unpatentable Over the Salter '631 Patent in View of the Abe '434 Patent and the Douthit '507 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claim 51 is incorporated herein in their entirety. Furthermore, Applicant notes that the Examiner's Answer has modified the Salter '631 patent to have a generator housing located upwind of a rotor as taught by the Abe '434 patent and to have contacts as disclosed by the Douthit '507 patent. Accordingly, the combination as set forth in the Office Action does not include any tower including an elevator or a carriage as such is not disclosed in the Salter '631 patent nor

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added to the teaching of the Salter '631 patent as set forth in the Office Action. Furthermore, Applicant submits that there is no suggestion or motivation for such a combination as discussed above in regard to claims 16 and 25. Accordingly, claim 44 is in condition for allowance.

**G. Rejection of Claim 53 as Being Unpatentable Over the Salter '631 Patent in View of the Abe '434 Patent and the Barnes '631 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claim 53 is incorporated herein in their entirety. Furthermore, Applicant submits that the Salter '631 patent teaches away from the combination as set forth in the Examiner's Answer. First, Applicant notes that the Examiner's Answer states that Applicant has neglected the elements introduced by the Salter '631 patent in Applicant's argument for allowability of claim 53 in the Appeal Brief. Applicant believes that the Examiner is referring to Applicant's omission of a reference to the Salter '631 patent in the heading regarding claim 53 in the Appeal Brief. However, Applicant's argument for allowability of claim 53 in the Appeal Brief directly addresses the Salter '631 patent and therefore Applicant has not neglected the elements introduced by the Salter '631 patent. Notably, the Salter '631 patent discloses that the blades 19 of the Salter '631 patent are fixed in position by the rim 13. Therefore, there is no suggestion or motivation for allowing the blades 19 to slide outward because they would not be able to move outward because of the rim 13. Accordingly, claim 53 is in condition for allowance.

**H. Rejection of Claim 57 as Being Unpatentable Over the Abe '434 Patent in View of the Fergusson '346 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claim 57 is incorporated herein in their entirety.

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**I. Rejection of Claims 72 and 74 as Being Unpatentable Over the Abe '434 Patent in View of the Barnes '631 Patent**

The Applicant's Appeal Brief stands, and the arguments relative to allowability of claims 72 and 74 are incorporated herein in their entirety.

Furthermore, Applicant submits that the Examiner's Answer has not properly addressed Applicant's arguments for allowability of claims 72 and 74 in the Appeal Brief. The Examiner's Answer responded to Applicant's arguments for allowability of claims 72 and 74 by stating that:

applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., biasing the whole and not the part of the airfoil blade or the force from the wind to be applied over an entire length of spars lessens as airfoils pivot) are not recited in the rejected claim(s).

Page 21 of the Examiner's Answer. First, in regard claim 72, Applicant addressed the blade tip of the Barnes '631 patent as the blade tip is the only part of the blade of the Barnes '631 patent that is biased. Since the blade tip of the Barnes '631 patent is not biased as claimed in claim 72, the Barnes '631 patent does not include all of the features of claim 72. Second, in regard to claim 74, Applicant notes that claims 74 states that "a force from wind applied to the airfoil lessens over an entire length of the spars as the airfoils pivot." Therefore, contrary to the argument set forth in the Examiner's Answer, claim 74 does include the features lacking in the Abe '434 patent and the Barnes '631 patent. Furthermore, Applicant submits that implicit in this statement in the Examiner's Answer is an admission that these two references do not include this feature of claim 74. Accordingly, claims 72 and 74 are in condition for allowance.

**SUMMARY**

Each appealed claim recites features that are not disclosed by any of the cited references and it would not have been obvious to modify the cited references to include the recited features

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of the appealed claims. The references upon which the Examiner relies in the Examiner's rejections of the finally rejected claims does not disclose or suggest the claimed pivot ring, upwind generator, tower, and cam surface and cam member as each individually claimed. Applicant's invention resolves problems and inconveniences experienced in the prior art, and therefore represents a significant advancement in the art. Applicant earnestly requests that the Examiner's final rejection of claims 9, 10, 15-19, 24-28, 39, 41-45, 50-57, 71, 72 and 74 inclusive, be reversed and that the application be passed to issuance forthwith.

Respectfully submitted,

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MPD/msj

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